United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1149

To be argued by
MARK A. SPEISER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1149

UNITED STATES OF AMERICA,
Appellee,

—v.—

BENJAMIN EISENBERG,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.
United States Attorney for the Southern Distict of New York, Attorney for the United States of America.

MARK A. SPEISER,
Special Attorney,
United States Department of Justice.
AUDREY STRAUSS,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

RULES AND STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1149

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN EISENBERG,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Benjamin Eisenberg appeals from a judgment of conviction entered on March 9, 1976, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 850 was filed on August 26, 1975 in five counts. Counts One through Four charged that on May 6, 1975 Eisenberg appeared before a federal grand jury and made false declarations in violation of Title 18, United States Code, Section 1623. Count Five charged that Eisenberg, by giving false and evasive answers during this same grand jury appearance, endeavored to obstruct and impede the due administration of justice in violation of Title 18, United States Code, Section 1503.

Trial commenced on January 8, 1976 and concluded on January 9, 1976 when the jury returned a verdict of guilty on Counts One, Two, Three and Five. A verdict of not guilty was returned on Count Four.

On March 9, 1976, Judge Pollack sentenced Eisenberg to concurrent terms of 18 months' imprisonment on each of the four counts. A fine of $1,500 was imposed on each count.

Eisenberg is at liberty pending appeal.

Statement of Facts

The Government's Case

A. Eisenberg's grand jury testimony

On May 6, 1975, Benjamin Eisenberg appeared, under subpoena, before a federal grand jury duly empaneled in the Southern District of New York. That grand jury was conducting an investigation into extortionate credit transactions, in violation of Sections 891, *et seq.*, 1955, 1962(c) and 1963 of Title 18, United States Code. After being advised of his constitutional rights and after consulting with his attorney, Eisenberg invoked his Fifth Amendment privilege against self-incrimination in response to the questions propounded to him. A grant of immunity pursuant to Title 18, United States Code, Sections 6001-6003, was then conferred upon him.

Under immunity, Eisenberg was questioned about extensions of usurious loans, as well as the use of extortionate means to collect such loans. (G.J. 17-19, 20-24, 27, 31-35, 39-40, 73-75).* Eisenberg was asked to divulge

---

* "G.J." refers to the transcript of Eisenberg's grand jury testimony of May 6, 1975. That transcript in its entirety was admitted into evidence as Government Exhibit 2.

the identities of persons who had received usurious loans from him or from his associates. (G.J. 17-18, 19-20, 24-26, 28, 31-38). Eisenberg was also questioned about his knowledge of illegal gambling operations. (G.J. 7-16, 40-73).

After acknowledging before the grand jury that he had lent people money on occasions, Eisenberg was asked the names of any persons who owed him money. Eisenberg claimed that he had forgotten their names and that he did not pay any attention to names since in this "type of business you just forget about people that owe you money." (G.J. 28). When asked if he ever employed threats, Eisenberg testified that he "never threatened anybody in my life" (G.J. 28) and that he does not even "say you must pay me or anything like that." (G.J. 38). Eisenberg's testimony in this regard was the basis for the perjury charge in Count One.

After conceding he had no problem collecting money from people he had known for many years, Eisenberg was asked the names of those persons. He testified that he did not know any of their last names. (G.J. 32-33). That statement was the predicate for the perjury charge in Count Two of the indictment.

Eisenberg further testified that he had lent somebody a sum in excess of $500 on only one occasion. When asked that person's identity, he attempted to decline to answer on the ground that the individual was a friend and that he was married and had a family. Upon being informed that he could not refuse to anwer on that ground, Eisenberg testified that this individual's name was "Jack." The defendant claimed he did not know Jack's last name (G.J. 36-37). These statements to the grand jury were the basis of Count Three.

The last perjury charge, Count Four, was based on Eisenberg's statements to the grand jury that he did not lend money "at any rate." On further questioning, Eisenberg conceded that he lent money and charged interest "on occasion," but asserted that he could not recall the rate of interest. The jury acquitted Eisenberg on this count.

In general Eisenberg's testimony before the grand jury revealed a purposeful effort to frustrate the grand jury's investigation by concealing from the panel information that he patently possessed. He repeatedly claimed that he could not recall information which, by the very nature of his money lending activities, he could be presumed to remember. For example, having stated he lent his money to people, Eisenberg asserted that he did not recall the last person to whom he had made a loan; the last time he lent somebody money; how much he ever lent to one person; how long he has been lending people money; how many people he lent money to; the full names of any of his borrowers; how and where he would collect his money, and specifically, where he initially met a borrower whom he identified as "Whity." (G.J. 26). When questioned about persons who still owed him money, Eisenberg stated he had forgotten their names. When pressed for the names of people whom he had characterized as "friends," he responded, "Names like Joe and Andy and Sammy. People I know." (G.J. 32). This evasive testimony, together with the testimony alleged to be false in Counts One through Four, was the predicate for the obstruction of justice charge contained in Count Five of the indictment.

B. The testimony at trial

After offering into evidence the grand jury testimony of the defendant, the Government called witnesses to prove the defendant had in fact lied under oath and endeavored to obstruct the grand jury investigation, as

charged. The Government's first witness was Michael Dubler, who testified that he met Eisenberg, in the fall of 1972 through a friend named "Bernie." (Tr. 29).* At the time, Dubler was employed as a salesman in a retail stereo store. Eisenberg called Dubler and then came to Dubler's store the same day. Following a short discussion Eisenberg agreed to lend Dubler $1,000, which Eisenberg then gave him that same day in cash. Tr. 29-32). The loan was to be repaid in ten weeks, in payments of $120 a week. (Tr. 32). In each of the succeeding four or five weeks, a man, whom Dubler later learned was Eisenberg's brother, appeared at the store to collect the weekly $120. (Tr. 33-34). Following some initial payments Dubler defaulted on a payment. He then received a telephone call from Eisenberg who, Dubler testified, "cursed me out in every possible way" and insisted that he pay. (Tr. 35-37). Eisenberg also told Dubler to pay a $20 penalty for the week when he had missed his payment. (Tr. 37). The next week, Dubler was again unable to meet his payment. On that occasion Eisenberg came to the store and again called me everything he could possibly call somebody," (Tr. 39), and "at one point, what frigthened me, he said someone would come down and see me". (Tr. 41). Thereafter, Dubler received two more telephone calls from Eisnberg during which Eisenberg cursed him. (Tr. 39-41). Dubler testified he then paid Eisenberg $50 and shortly thereafter, approximately April, 1972, left New York and had no further contact with Eisenberg. In total, Dubler paid Eisenberg approximately $800. (Tr. 42). Dubler said he never told Eisenberg his name was "Jack." (Tr. 43).

The Government then called Robert Aronowitz, who testified that following his receipt of a telephone call from Eisenberg at his place of business in New York City approximately eight years ago, he and Eisenberg met to

---

* "Tr." refers to pages of trial transcript.

discuss a loan of money. (Tr. 69-72). At that meeting Eisenberg agreed to lend Aronowitz $30,000 at a cost of $600 interest a week. (Tr. 73). Under the term of the loan, Aronowitz was required to pay Eisenberg $600 every week the loan was outstanding until he was able to repay Eisenberg the $30,000 in one lump sum. (Tr. 73-74, 111). A few days after their first meeting, Aronowitz met Eisenberg on 38th Street and Seventh Avenue, where Eisenberg gave him an envelope containing $30,000 in cash. (Tr. 74-77).

Thereafter, Eisenberg telephoned Aronowitz and told him he would be coming to Aronowitz's office to collect the initial $600. (Tr. 77). After this first payment, Eisenberg asked Aronowitz to sign a promissory note for the $30,000. (Tr. 78). Aronowitz met Eisenberg at a bank and signed the promissory note. Aronowitz never received a copy of the note or saw it again. (Tr. 78-79).

Over the next four year period, Aronowitz paid Eisenberg over $125,000 on the $30,000 loan. (Tr. 81). He made some payments directly to Eisenberg, who came to Aronowitz's place of business on West 38th Street to collect the weekly $600. More often he paid Phil, Eisenberg's brother. (Tr. 79-81). After the four years, Aronowitz moved his declining business to West 37th Street and at that time he could no longer afford to continue making the $600 weekly payments. Although Aronowitz did not inform Eisenberg of his new location, Eisenberg came to his office and yelled profanities at him because of his inability to continue to make any more $600 payments. Tr. 86-87). Reluctantly, Eisenberg then agreed to accept from Aronowitz payments of between $50 to $75 a week which Aronowitz made to both Eisenberg directly and his brother Phil at his West 37th Street address for a period of about three months. (Tr. 90). Aronowitz the nmoved to West 36th Street where Phil

(Eisenberg) visited him and Aronowitz gave him $25 a week for a few weeks. (Tr. 91).

Aronowitz never attempted to contact Eisenberg to make a payment, nor did he ever meet him at a bar or on the street to make a payment of $600. (Tr. 89). Aronowitz never used the name "Jack" to identify himself to Eisenberg. (93). Furthermore, Aronowitz told Eisenberg his last name when he met and had signed his full name on the promissory note which he executed at Eisenberg's request. (Tr. 93-94).

In addition to the $30,000 loan, Aronowitz testified that he borrowed an additional $7,000 from Eisenberg a few years after he obtained the $30,000 loan. (Tr. 94). This money was to be used to open a dress shop in Rockland County. (Tr. 94-95). The money was given to Aronowtiz by Eisenberg at the dress shop. (Tr. 95, 114). Aronowitz told Eisenberg he would give him a share in the business in exchange for the loan but the loan was never repaid. (Tr. 115-116).

The Defendant's Case

The defendant presented no witnesses.

ARGUMENT

POINT I

The evidence was more than sufficient to establish that Eisenberg committed perjury.

Eisenberg contends that the evidence at trial failed to establish beyond a reasonable doubt that he committed perjury as charged in Counts One through Three. The

contention is entirely without merit. The evidence, viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), amply demonstrated that, with respect to each count, Eisenberg's testimony before the grand jury was knowingly false.

With respect to Count One, Eisenberg was specifically asked whether he had ever threatened anybody. He interrupted the question and categorically denied that he had ever threatened anybody in his life. Subsequently, in a volunteered statement, he asserted that, "I don't threaten anybody and I don't say you must pay me or anything like that."

Dubler, however, explicitly testified that during a face to face confrontation, Eisenberg threatened him by telling him that, "someone would come down and see me". (Tr. 41). Dubler further testified that on several occasions Eisenberg cursed him during conversations about repayment of the loan (Tr. 37). Aronowitz also testified that Eisenberg swore at him when he failed to make interest payments on his loan. (Tr. 86, 87). The jury could permissibly have inferred that each of these incidents amounted to demands for payments, as well as explicit and implicit threats, by the defendant.*

---

* During Dubler's cross examination, defense counsel attempted to impeach Dubler's testimony about being threatened by Eisenberg. The essential thrust against Dubler in this regard consisted of confronting him with his purportedly inconsistent grand jury testimony of November 14, 1973 wherein he stated that Eisenberg never threatened to *shoot him* (Tr. 58, 59 60) or *kill him* (Tr. 63, 64). Judge Pollack properly observed the lack of inconsistency in these two statements in the following colloquy with defense counsel:

> "Mr. Washor: Your Honor he testified on direct that this man (Eisenberg) threatened him.
>
> The Court: Yes, that's rights. Did he talk about a gun on his direct examination?" (Tr. 63)

[Footnote continued on following page]

With respect to the remaining assignment of perjury in Count One, Eisenberg's testimony was that he does not "go looking for" the money owed him and that when people failed to pay he just forgot about it. This testimony was directly contradicted by Dubler and Aronowitz. Both testified that on more than one occasion, Eisenberg came to their respective places of business, attempted to collect money from them and pressured them to continue making their weekly payments. Dubler and Aronowitz also testified that they never sought Eisenberg out to make these weekly payments.

As to Eisenberg's testimony in Count Two that he did not know of "anybody's last name," the Government proved the falsity of this testimony through both direct and circumstantial evidence. Aronowitz testified that he told Eisenberg his last name when he first met him and that he signed his full name to a promissory note Eisenberg requested shortly after the $30,000 loan was negotiated. Eisenberg retained that note. Aronowitz also testified that the defendant managed to locate him at his new place of business, alhough he had not conveyed his new location to Eisenberg or his brother Phil. Given

---

Nevertheless, defense counsel was permitted to bring the claimed inconsistency to the jury's attention and to gain whatever benefit could be derived from it.

It is now argued on appeal that in addition to the impeachment value, the grand jury transcript was admissible as affirmative evidence under *United States v. DeSito*, 329 F.2d 919 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964) and Rule 801(d)(1), Federal Rules of Evidence. This argument is not only legally incorrect but it is entirely beside the point since the defendant failed even to offer the grand jury testimony into evidence. (Tr. 63). Had such an offer been made, an objection to its admissibility would have been properly sustained on the ground that no inconsistency was shown and the witness had reaffirmed the truthfulness of the grand jury testimony. It is difficult to discern, in any event, how Dubler's grand jury testimony would have served to do anything but confirm his trial testimony.

this testimony, as well as the long term nature of Eisenberg's dealings with Aronowitz, the jury could properly have concluded that Eisenberg knew Aronowitz' last name.*

---

* With respect to the proof as to Count Two, the defendant argues that the Government submitted no evidence showing that Eisenberg could recall last names. Of course, such proof would almost necessarily be circumstantial and Aronowitz' testimony provided ample circumstantial evidence from which Eisenberg's ability to recollect could be fairly inferred. In addition, the jury had before it Eisenberg's grand jury testimony which contained dramatic illustrations that his memory was as good as he wanted it to be. For example, Eisenberg had no trouble remembering the name of a specific bar (the Mayfair) and its address (47th Street), where he indicated he met people to lend them money. (Gr. 27). Eisenberg's memory also did not fail him when he testified that he met a man by the name of "Lefty" on 40th and Broadway six years ago. (Gr. 33-34). In fact in several instances, Eisenberg pointedly told the grand jury that he has a good memory:

> Q. I don't mean right at this moment. Somewhere are there in existence records that reflect loans that you have made to other individuals? A. Right at this minute? I don't have any records. I keep everything in my head. (Gr. 39).

In the context of questioning about his gambling activities Eisenberg further stated:

> Q. You just told the Grand Jury that you take bets. Now and then you take a bet, what do you do with the money? A. I keep it.
>
> Q. Then do you pay off the winning person with the money? A. If they win I pay them. If they lose, they don't get pay.
>
> Q. How do you know what person to pay how much money? A. I keep it in my mind. (Gr. 41-42).
>
> Q. So somebody calls you and places a bet with you right? A. Yes.
>
> Q. Is it your testimony that you just remember that in your head? A. That's right.
>
> Q. How can you remember that in your head. A. Very simple. I concentrate on what I do and I remember it. There is only a few trancactions. There aren't many. (Gr. 42-43).

With respect to Count Three, again the evidence of perjury was more than sufficient. Eisenberg had testified that on only one occasion he had lent someone more than $500 at one time and that this person's first name was Jack. However, Dubler testified he borrowed $1,000 from Eisenberg three and one-half years earlier (Tr. 28) and Aronowitz stated that Eisenberg lent him $30,000 a few years thereafter. (Tr. 94). Furthermore, both testified that they never identified themselves to Eisenberg by the name "Jack." Given this directly contradictory evidence, Eisenberg's contention that the Government failed to introduce sufficient evidence that Eisenberg committed perjury as alleged in Count Three is plainly frivolous.

In arguing the insufficiency of the evidence with respect to Counts One, Two and Three, Eisenberg claims that his answers to the questions propounded in the grand jury, although unresponsive, were technically true, and that therefore, relying on *Bronston* v. *United States*, 409 U.S. 352 (1973), he was entitled to an acquittal on the affected counts. *Bronston*, however, is plainly inapposite. In that case, the defendant had given literally true answers which were unresponsive and therefore misleading to the questioner. In this case, there can be no claim of literal truth and, indeed, appellant's brief fails totally to specify the basis of his reliance on *Bronston*. With respect to Count One, Eisenberg cannot assert that he literally never threatened anybody, when there was testimony, apparently believed by the jury, that he had. With respect to Count Two, he cannot now say that he literally did not recall last names, again in the face of evidence that he had every reason to know and remember Aronowitz' last name. Finally, with respect to Count Three, any claim of literal truth is contradicted by clear evidence that loans over $500 were in fact made to persons other than "Jack." Thus, the defendant's reliance on *Bronston* is entirely misplaced.

Finally, in passing, the defendant argues that the Government was obliged to confront him with the evidence which Dubler and Aronowitz would give and that, in addition, he should have been warned that he might be indicted for perjury. There is no legal basis for these claims. It is well settled that the Government is not under a legal duty to advise a grand jury witness of the existence of separate independent proof relative to the subject matter about which the witness is being questioned. *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975); *United States* v. *Winter*, 348 F.2d 204, 210 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965). *See also United States* v. *Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 6, 1975). As Judge Weinfeld stated in *United States* v. *Winter*, *supra* at 210:

> And oath to tell the truth as one knows it is not conditioned upon what others may have testified.

Further, under *United States* v. *Del Toro*, *supra*, at 664, the prosecutor has no duty repeatedly to advise a grand jury witness of his obligation to tell the truth when he has sworn upon his oath to tell the truth.* The Supreme Court recently reaffirmed this principle in *United States* v. *Mandujano*, 44 U.S.L.W. 4629, 4635 (May 18, 1976).

---

* Here, in addition to the administration of the oath, Eisenberg was warned on two occasions that under the grant of immunity he remained vulnerable to prosecution for perjury. (G.J. 5-6).

POINT II

Eisenberg was properly convicted of obstructing justice in violation of 18 U.S.C. § 1503.

Eisenberg seeks reversal of his conviction on Count Five, on the ground that false and evasive testimony does not constitute an endeavor to obstruct justice in violation of 18 U.S.C. § 1503. However, this issue has been specifically resolved in this Circuit against the defendant's position. In *United States* v. *Cohn*, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972) this Court held that a deliberate attempt to frustrate a federal grand jury investigation through the means of false and evasive testimony may constitute an endeavor to obstruct justice in violation of 18 U.S.C. § 1503. Even more recently, in *United States* v. *Marion*, Dkt. No. 75-1408 (2d Cir., May 7, 1976), this Court affirmed a defendant's conviction for obstruction of justice predicated upon his false and evasive testimony. *See also United States* v. *Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971).

Resolution of the issue of whether Eisenberg's grand jury testimony was false and evasive and constituted a deliberate attempt to conceal information was a question of fact for the jury. The latter, in deciding that question adversely to Eisenberg, did so in accordance with legal instructions to which Eisenberg took no exception.* Contrary to Eisenberg's suggestion, the jury was carefully

---

* Eisenberg's failure to object to the trial court's jury instructions on Count Five precludes any attack on those instructions on this appeal. *United States* v. *Bermudez*, 526 F.2d 89, 98-99 (2d Cir. 1975). *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975), *cert. denied sub nom. Pocono International Corp.* v. *United States*, 44 U.S.L.W. 3654 (May 19, 1976); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); Rule 30, Fed.R.Crim. P.

advised that a finding of falsity or evasion would not alone suffice to establish the obstruction of justice offense:

> "If you find beyond a reasonable doubt that the defendant gave false or evasive answers as set forth in Count 5 of the indictment, then you must also determine whether those false or evasive answers constituted a corrupt, wilful and knowing endeavor to obstruct or impede the due administration of justice." (Tr. 193).
>
> * * * * *
>
> "I also charge you as a matter of law that obstruction of justice includes concealing from a grand jury information which is relevant and germane to its functions." (Tr. 194).

Eisenberg's reliance on *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969), is clearly misplaced. In *Essex*, the court was confronted with the affidavit of a juvenile which had been voluntarily submitted to a trial court in support of a motion for a new trial. The defendant's statement in that affidavit that she had engaged in improprieties with members of the trial jury during their deliberations was concocted out of a whole cloth. Her prosecution for a violation of Section 1503 was predicated solely on the alleged falsity of the foregoing statement. The Government neither contended nor proved that the defendant had *concealed* any information sought by an inquiring body.

Eisenberg inappropriately asserts that the sanctioning by this Court of a prosecution for obstruction of justice under Section 1503 will serve to avoid any requirement of corroboration of proof in a prosecution for false declarations under Section 1623. With respect to perjury prosecutions under Section 1621, this very claim was considered and rejected by this Court. *United States* v. *Cohen*, *supra*

at 884. In so doing, this Court noted that a wholesale evasion of the "two witness rule" of Section 1621 would not occur since proof of an offense under Section 1503 requires evidence not merely of the falsity of any statement but additionally of the deliberate concealment of knowledge. The argument raised and rejected in *United States* v. *Cohen*, *supra*, is even weaker in the context of this case, where the prosecution was based on Section 1623, which explicitly eliminates the requirement that proof of the falsity of any statement must be established by any particular number of witnesses or documents. See *United States* v. *Ruggiero*, 472 F.2d 599, 606 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

POINT III

Eeisenberg is entitled to no relief on the basis of his claim that he should have been advised in the grand jury that he was a target of the investigation.

Eisenberg now argues that the Government attorney should have advised him, before his grand jury testimony, that he was a target of the investigation. Although he does not specify the relief to which he believes himself entitled on this ground, the putative error would presumably be corrected only by suppression of his perjurious testimony or dismissal of the indictment. However, Eisenberg never moved to suppress or to dismiss on this ground, nor did he raise this issue for a ruling by the District Court in any form whatsoever. Accordingly, his point must be considered to have been waived and he is precluded from raising it now on appeal. Rule 52(b), Fed.R.Crim. P.; *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1963), *cert. denied*, 383 U.S. 907 (1966).

However, assuming *arguendo* that the merits of the issue were to be reached, the argument by Eisenberg is frivolous. The only basis of his claim to being a target of the investigatiton is the testimony of Charles E. Fink, the grand jury foreman who, over objection by the Government, was permitted to testify on cross-examination that he believed Eisenberg to be a target of the investigatiton. After further questioning it became apparent that Fink had no understanding of the legal import of the term "target" and that the basis of his opinion was merely that Eisenberg's nam had been mentioned by other witnesses before the grand jury.*

Apart from the fo. man's confusion over the meaning of the term, Eisenberg has absolutely no basis for claiming that he was a target of the grand jury investigation. Obviously, the grant of immunity accorded him, pursuant

---

* On redirect examination and under questioning by the Court, Fink testified as follows:

Q. Mr. Fink, can you explain to the jury what you mean by the fact that Mr. Eisenberg was a target of the Grand Jury investigations? A. I believe his name was brought up by two witnesses.

Q. Thank you very much, Mr. Fink.

THE COURT: Is what you understand by the word "target?"

THE WITNESS: Yes, sir.

THE COURT: In other words, that his name had been mentioned by two witnesses and you wanted to find out if he had any knowledge on the subject matter?

THE WITNESS: That's right, sir.

THE COURT: Were you at that time seeking to obtain information that would indict him?

THE WITNESS: We are asking him for information.

THE COURT: You are asking for information?

THE WITNESS: Yes.

THE COURT: Were you asking him for information about himself or asking him for information of what he knew?

THE WITNESS: Of what he knew. (Tr. 19-20).

to 18 U.S.C. § 6002 entirely eliminated the use or derivative use of that testimony against him other than in those limited circumstances permitted by the statute—a fact of which Eisenberg was specifically twice apprised. (G.J. 5-16). In these circumstances, ordinary target warnings have no purpose or applicability.

Thus, Eisenberg's reliance on *United States* v. *Jacobs*, Dkt. No. 75-1319 (2d Cir., Feb. 24, 1976) is misplaced. In that case the defendant was questioned, without a grant of immunity, about threats which she, the defendant allegedly had made in violation of 18 U.S.C. § 875(c). The defendant was ultimately indicted for that crime, as well as for perjury in violation of 18 U.S.C. § 1623. Not only was Jacobs not warned of her status as a target, but she appeared in the grand jury without advice of counsel, she testified without warning of her right to remain silent and most importantly, she had no grant of immunity. Here, in contrast, the defendant appeared in the grand jury with counsel available for consultation; received his constitutional warnings; invoked his Fifth Amendment privilege; then received immunity from prosecution based on his testimony; and was warned of his continuing liability for perjury. Accordingly, there can be no claim, as in *Jacobs*, that the defendant walked blindly into incriminating himself.*

---

* Although the Government contends that *United States v. Jacobs, supra*, simply does not apply to this case, the basis of the *Jacobs* decision would appear to have been impliedly overruled by the recent Supreme Court opinion in *United States v. Mandujano*, 44 U.S.L.W. 4629 (May 18, 1976), reversing the Fifth Circuit opinion, 496 F.2d 1050 (1974), which had been noted with approval by this Court in *Jacobs*. First, the plurality opinion in *Mandujano* characterized the practice of giving Constitutional warnings to a grand jury witness as "an extravagant expansion never remotely contemplated by this Court in *Miranda*." 44

[Footnote continued on following page]

Finally, Eisenberg contends that a failure to warn him that he was a target of the investigation somehow hampers him from later determining whether any subsequent prosecutions were barred by the grant of use immunitty. This argument not only makes no sense, but is thoroughly inapposite. Whatever may be the implicatitons of the absence of target warnings for some future, hypothetical prosecution of Eisenberg is clearly not a question ripe for determination on this appeal. Moreover, even had Eisenberg been told before his grand jury testimony that he was a target, he would be in no different position than he is today to move to dismiss any subsequent prosecution on the ground that it was tainted by his immunized testimony. Indeed having not received a target warning, he may in fact be in a better position since he can claim that the lack of a target warning indicated that the Government had no evidence of any of his criminal activities prior to his grand jury testimony.

U.S.L.W. at 4634. Second, and more important, perhaps, for purposes of this case, all eight members of the high court who took part in *Mandujano* agreed that in a prosecution for perjury committed before a grand jury, the absence of *Miranda* warnings to that grand jury witness, even though the latter was then a "putative defendant," did not warrant suppression of the perjurious grand jury testimony.

Finally, whatever the vitality of *Jacobs* after *Mandujano*, there is sound authority for the view that the requirements imposed by *Jacobs* on prosecutors have only propective application. *United States v. Guthrie*, 76 Cr. 21 (S.D.N.Y. May 12, 1976) (Pierce, J.), slip op. at 5. Here, the challenged grand jury testimony occurred on May 6, 1975—some nine months before the date of the *Jacobs* decision on February 24, 1976. Accordingly, *Jacobs* affords Eisenberg no relief.

POINT IV

The District Court's denial of a continuance was not an abuse of discretion or a denial of effective assistance of counsel.

Finally, Eisenberg argues that the District Court committed reversible error in denying his request for a continuance until the next day to decide whether he should take the stand in his own defense and to enable his counsel to prepare a summatiton. At the conclusion of the Government's case, which took less than a full trial day, Eisenberg's counsel told the Court that he was not ready to go forward with his defense because of the lateness of the day, 5:20 p.m. (Tr. 123).* The Court then granted the defendant a ten-minute recess to decide whether Eisenberg would take the stand. Defense counsel made no objection to proceeding in this way and indicated that the ten-minute recesse was sufficient for this purpose. After the recess the Court was advised that the defense would rest.

Counsel for Eisenberg then requested an overnight adjournment for preparation of summation. Noting the simplicity of the trial issues, the prior adjournments of the dates scheduled for trial and the suspension of the trial for a one-half hour period so that Eisenberg's counsel could dispense with another matter before a different court, Judge Pollack ordered that the summations be given on that day following a further ten-minute recess granted again at defense counsel's request. The District Court's exericse of its discretion in this regard was proper and did not constitue an abuse of discretion.

---

* The trial transcript incorrectly attributes this statement to the Government attorney, Mr. Speiser.

The decision as to whether a continuance should be granted rests within the discretion of the trial court, and so long as that descision is reasonable, exercise of that decision will not be disturbed unless a clear abuse is shown. *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). Each case depends on its particular facts. *United States* v. *White*, 324 F.2d 814 (2d Cir. 1963). In view of the length of time that elapsed between indictment (August 26, 1975) and trial (January 8, 1976), the number of material witnesses (only two), the shortness of the Government's case, and the absence of complex issues, it is more than apparent that Judge Pollack's denial of the request for a continuance was proper.

Eisenberg's suggestion that the denial of an overnight continuance to prepare a summation denied him his Sixth Amendment right to the effective assistance of counsel does not comport with the standards adopted by this Court in ascertaining whether that right has been violated. The test is whether the party demonstrates that lack of effective assistance of counsel was such "as to shock the conscience of the court and make the proceedings a farce or mockery of justice." *Untied States* v. *Bentvena*, *supra* at 935; *United States* v. *Wright*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 388 U.S. 950 (1950). Ample time existed for the preparation of Eisenberg's case. The representation afforded Eisenberg at trial was in no way impinged upon by the District Court's decision to hear closing arguments iimmediately following the presentation of witnesses.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitited,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern Distict of New York,
Attorney for the United States
of America.

MARK A. SPEISER,
Special Attorney,
United States Department of Justice.
AUDREY STRAUSS,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK A. SPEISER, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of June, 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

MICHAEL S. WASHOR, ESQ.
Washor & Washor
16 Court Street
Brooklyn, New York 11241

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Mark A. Speiser
MARK A. SPEISER

Sworn to before me this

7th day of June 1976

Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609174
Qualified in Kings County
Commission Expires March 30, 19 77